Office-Supreme Court, U.S.
FILED
FEB 14 1961
JAMES R. BROWNING, Clerk

No. [redacted] 35

In the Supreme Court of the United States

OCTOBER TERM, 1960

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDTJAN IRON COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

ARCHIBALD COX,
Solicitor General,
Department of Justice, Washington 25, D.C.

STUART ROTHMAN,
General Counsel,
National Labor Relations Board,
Washington 25, D.C.

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 646

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BRANDMAN IRON COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

In the petition, we indicated that the views of the court below, although in agreement with those of the First Circuit in the *Ochoa* and related cases, were contrary, *inter alia*, to those of the Second Circuit in *Combined Century Theatres* (Pet. 9, 17–19). Subsequent to the filing of the petition, the Second Circuit had occasion to reconsider the problem in the light of the intervening decisions of the court below in this case and of the First Circuit in *Ochoa*, and decided to adhere to its earlier view that the reviewing court lacked power to modify an order which was uncontested before the Board. *National Labor Relations*

Board v. *Enterprise Association*, January 30, 1961. For the convenience of the Court, we set forth in the Appendix, pp. 3–4, *infra*, the Second Circuit's *per curiam* opinion in that case.[1]

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

STUART ROTHMAN,
General Counsel,
National Labor Relations Board.

FEBRUARY 1961.

---

[1] The case involved a situation similar to that in *National Labor Relations Board* v. *Local 476, United Association*, petition for certiorari pending, No. 656, this Term. That is, the Board found a violation of the secondary boycott provision, Section 8(b)(4)(A). The Second Circuit, although sustaining the finding of a violation, modified the breadth of the order although no exceptions were filed (47 LRRM 2189, November 25, 1960). The Board petitioned for rehearing on the ground that, since no exceptions had been filed with the Board concerning the scope of the order, the modification was beyond the court's power. The Second Circuit, unlike the First Circuit in *Local 476*, reversed itself and enforced the order in its original form.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 26186

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

ENTERPRISE ASSOCIATION OF STEAM, HOT WATER, HYDRAULIC, SPRINKLER, PNEUMATIC TUBE, ICE MACHINE AND GENERAL PIPEFITTERS OF NEW YORK AND VICINITY, LOCAL UNION NO. 638, OF THE UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AND MICHAEL F. DALY, ITS AGENT.

Respondents.

Decided January 30, 1961

Before:

HINCKS, WATERMAN AND MOORE,

Circuit Judges.

On Petition for Rehearing

PER CURIAM:

Since the respondents did not except to the breadth of the order recommended by the Trial Examiner, the order adopted by the Board should not have been modified because of its breadth. In providing for

enforcement petitions by the Board to the courts of appeal, Congress expressly limited the scope of judicial review. It cautioned: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." Sec. 10(e) of the National Labor Relations Act, as amended, 29 U. S. C. A. § 160(e). In cases involving the breadth of orders of the Board, this limitation was recognized by this court in *N. L. R. B.* v. *Steel, etc., Fabricators, Local 810, Int'l Bhd. of Teamsters,* 253 F. 2d 832, 834, and in *Precision Fabricators* v. *N. L. R. B.,* 204 F. 2d 567, and indeed, is required by *N. L. R. B.* v. *District 50, United Mine Workers of America,* 355 U. S. 453. The decision in *Communications Workers* v. *N. L. R. B.,* 362 U. S. 479, is not to the contrary. It does not there appear that the breadth of the order which the court narrowed had not been objected to before the Board and the brief, unanimous, *Per Curiam* opinion contains nothing to suggest that the court intended to overrule its recent holding in *N. L. R. B.* v. *District 50, United Mine Workers of America, supra,* also a unanimous decision.

We note that in *N.L.R.B.* v. *Ochoa Fertilizer Corporation,* 1 Cir., 283 F. 2d 26, and *N.L.R.B.* v. *Brandman Iron Co.,* 6 Cir., 281 F. 2d 797, those courts assumed to narrow orders not objected to before the Board. But those cases seem not to reconcile the action taken with the jurisdictional limitation of Sec. 10(e) or with the Supreme Court decision cited above. We will therefore adhere to our earlier decisions.

Accordingly, the last paragraph of our opinion of November 25, 1960 is withdrawn and the order will be enforced without modification.

U. S. GOVERNMENT PRINTING OFFICE 1961